stand together. *Kelly* v. *Washington*, 302 U.S. 1 (1937) and cases cited therein. Here, Section 16 of the Natural Gas Act grants the Federal Power Commission the power to issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act, and further specifically provide that:

> "Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after the publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe."

And, as evidenced by many decisions of this Court, the fundamental congressional purpose underlying the Natural Gas Act was to complement and supplement, insofar as possible, the existing state jurisdiction over matters of local concern. *Public Utilities Com.* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Federal Power Com.* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944); *Panhandle E. Pipeline Co.* v. *Public Serv. Com.*, 332 U.S. 507 (1947). When this underlying purpose is considered in conjunction with Section 16 of the Act, it shows that Congress did not intend to supersede or preclude state regulation over matters of local concern, such as the Oklahoma minimum price laws until the paramount federal authority over such matters have been exercised by the Commission.

By its own rules, the Commission's orders did not become effective until the date prescribed therein. The Commission first implemented its jurisdiction by the issuance of Order No. 174 on July 16, 1954. Prior to that time the Oklahoma minimum price laws constituted valid state regulations, and therefore, on June 7, 1954, the Oklahoma minimum price

law was a valid and subsisting state regulation which, by the terms of the contract between Petitioner and Natural, modified the contract. Accordingly, the contract rate on that date was 9.8262¢, and the court below erred in overruling the Commission's acceptance of the filing of that rate and in holding that the 6.253¢ rate should be reinstated. Because this error is based upon an erroneous interpretation of a decision of this Court, involves important federal questions and has a widespread effect, it necessitates corrective action by the Court by Writ of Certiorari. See 11 Oklahoma Law Review 65.

POINT II.

THE COURT OF APPEALS HAS EXCEEDED ITS JUDICIAL FUNCTION AND INVADED THE ADMINISTRATIVE PROVINCE.

1. The Court Below Exhausted Its Power of Review When It Held that 6.253¢ Per Mcf Was the Lawful Rate on File on June 7, 1954, and Its Further Orders Are Invalid.

In its opinion and judgment entered in conformity therewith, the Court of Appeals found not only that the Commission was in error in holding that the legally effective rate on June 7, 1954, was 9.8262¢ per Mcf instead of 6.253¢ per Mcf, but dictated subsequent Commission action be taken with respect thereto. This the court below was without authority to do.

The Court of Appeals laid bare the error of the Commission when it held that 6.253¢ was the rate in effect under the contract on June 7, 1954. Having done this, it exhausted its power under the statute and could go no farther. This Court has firmly established that the function of a court reviewing administrative action terminates when an error of law is laid bare, and at that point the matter should be

remanded for reconsideration by the administrative body unless its determination is final in itself. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Federal C. C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Sunray Mid-Continent Oil Company* v. *F. P. C.*, 353 U.S. 944 (1957). In the *Sunray* case, this Court said:

> "The power of the Court of Appeals in reviewing the order of the Federal Power Commission was exhausted when it held that the Commission had authority under Section 7(c) and (e) of the Natural Gas Act to issue certificates of public convenience and necessity of limited duration. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80."

In its judgment entered herein on February 26, 1958, the Court of Appeals modified the Commission's order of January 5, 1956, stating *inter alia:*

> " . . . paragraph (d) of said order be, and it is hereby modified so as to direct that the refund to be made by Dorchester to petitioner pursuant thereto be computed on the basis of the difference between ten cents per Mcf and 6.253 cents per Mcf for the period from March 1, 1955, to January 5, 1956 . . . "

The action of the court below in refusing to remand the matter back to the Commission denies the Commission the opportunity of determining whether or not the contract rate (6.253¢) was so low as to have an adverse effect on the public interest. Such a determination is purely a question for the Commission. See *Federal Power Com.* v. *Sierra P. P. Co.*, 350 U.S. 348, 356 (1956). Furthermore, the effect of the Court's order is to determine the manner and method of refund without giving the Commission an opportunity to determine how such refund might be made as being

required in the public interest To require an immediate refund of the total amount received would bankrupt Petitioner. Obviously, such a result is not in the public interest. The method and manner of refund involve questions requiring the expert competence of the Federal Power Commission to work out an adequate procedure which will protect the public interest. Failure to remand this case to the Commission for further action was erroneous and directly in conflict with the decisions of this Court, and requires correction by this Court by Writ of Certiorari.

CONCLUSION

This case involves important federal questions which concern the effect of the Natural Gas Act, and the administrative application thereof; its legal and financial consequences are far-reaching; the Court of Appeals has erroneously interpreted a decision of this Court and this error has resulted in a judgment in conflict with other decisions of this Court. Therefore, for these reasons, it is in the ultimate public interest to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,862

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

DORCHESTER CORPORATION,
Intervenor

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Argued December 2, 1957
Before McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 26, 1958)

By McLAUGHLIN, *Circuit Judge.*

The dispositive question here is, what was the lawful contract rate on June 7, 1954 for gas sold by intervenor, Dorchester Corporation to petitioner?

Dorchester is an independent producer of natural gas in Oklahoma. It is the immediate successor of Panoma Corporation which had originally succeeded the partnership of Harrington and Marsh as such producer.[1] Natural, the petitioner, on December 1, 1946, contracted with the partnership for the purchase of natural gas from the Guymon-Hugoton field in Oklahoma. The contract ran expressly until January 1, 1965 and at buyer's option as long thereafter as sellers are able to deliver gas in paying quantities from reserves allocated to the agreement. The price of 5.12¢ per Mcf (14.65 psia) increased to 6.253¢ per Mcf on July 1, 1951 until July 1, 1956 and thereafter was fixed at 7.145¢ per Mcf.

By its article Fourteenth the agreement is " • • • subject to present and future valid laws and present and future lawful orders of all regulatory bodies now or hereafter having jurisdiction over the parties • • •."[2] On July 29,

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[1] At the time when Panoma was in process of disposing of its leasehold interests to Dorchester, Natural was requested to consent to the transfer. It did so upon the clear understanding that:

"It is expressly stipulated, moreover, that such confirmation by Natural shall not impair any rights which Natural may have against any person, firm or corporation to recover the difference between the contract price and the price actually paid by Natural by reason of minimum price orders for gas delivered under the Gas Purchase Contract by such person, firm or corporation."

[2] Article Fourteenth in full reads:

"Contract Subject to Laws and Regulations.

"This contract is subject to present and future valid laws and present and future lawful orders of all regulatory bodies now or hereafter having jurisdiction over the parties; and should at any time during the term of this contract either party, by force of any such law or regulation imposed, be ordered or required to do any act inconsistent with the provisions of this contract, the contract shall, subject to the other provisions hereof, continue nevertheless, but shall then be deemed modified to conform with the requirements of such law or regulation."

1952 the order of the Oklahoma Corporation Commission fixed 9.8262¢ per Mcf (14.65 psia) as the minimum price for which gas produced in the Guymon-Hugoton field may be first purchased or sold. Natural advised Panoma, which had by then succeeded the partnership, that the Oklahoma Commission order did not apply to gas purchased by Natural under the December 1, 1946 contract, as amended. It stated that it was appealing from the order and that, pending final adjudication of its validity as to the contract gas, it would under protest pay in accordance with the state commission order and "In the event such order shall be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon."

On Natural's appeal the Oklahoma Supreme Court on April 27, 1954, affirmed the state commission's order. An appeal was taken to the United States Supreme Court. On June 7, 1954, the litigation took on a new complexion, for it was on that date that the United States Supreme Court, independent of the foregoing, announced its opinion in Phillips Petroleum v. Wisconsin, 347 U.S. 672 (1954). The effect of that decision was to render Dorchester, as a producer of natural gas, subject to regulation by the Federal Power Commission under the Natural Gas Act. Formerly producers such as Dorchester, not engaged in interstate transport of natural gas, had regarded themselves as exempt from such regulation. The Commission subsequently issued orders[7] providing the mechanics for bringing independent producers under the Commission's supervision. Dorchester was thereby required to file "rate schedules, as defined in §154.93, setting forth the terms and conditions

of service and all rates and charges for such transportation or sale effective on June 7, 1954." Rate schedules were defined in §154.93 as meaning "• • • the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions • • •" etc.

On July 1, 1954 Dorchester had succeeded Panoma.[4] On October 28, 1954 it tendered to the Commission for filing, the contract with Natural plus three supplements. Two of these were bona fide amendments to the contract and of no special importance. The third was a copy of the Oklahoma Corporation Commission's minimum price order, then on appeal to the United States Supreme Court, which Dorchester claimed fixed the actual contract price as of June 7, 1954 at 9.8262¢ per Mcf. Natural protested this to the Commission as illegal and requested that if the Commission did accept the nine cent rate for filing, that is, temporarily, that the payments in excess of the six cent contract rate be held in escrow, to be returned to Natural

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[3] These orders promulgated §§ 154.91, 154.92 and 154.93 of the Commission's Regulations. 19 Federal Register 4554 (1954). These were subsequently modified to an extent not material here. 19 Federal Register 5091, 6301, 8808 (1954).

[4] The arrangements by which this was accomplished are complex. We think it irrelevant to this dispute that the success of these arrangements may to some degree depend on Dorchester's receiving payments at 9.8262¢ per Mcf rather than at the contract rate. Natural, and Natural's customers, are not to be deprived of the benefit of the contract entered into openly and at arm's length because of Dorchester's later unjustified reliance on the validity and permanence of the higher rate which it knew was being appealed, with strong likelihood of success under Phillips Petroleum v. Wisconsin announced three weeks earlier.

1. whether any rate filing predicated solely upon a State minimum price order which has been declared invalid by the United States Supreme Court —

a. must now be regarded as having been invalid from the date of filing; or

b. must now be regarded as having become invalid upon the issuance on January 20, 1958 of the decision of the Supreme Court in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, or on March 12, 1958, when the mandate of the Supreme Court was issued in that case; or

c. must now be regarded as having become invalid on the happening of some other event; or

d. must be regarded as still effective;

i. by reason of failure of the purchaser thereunder to protest the filing; or

ii. by reason of an agreement, expressed or implied, to pay the filed rate;

iii. by reason of legal estoppel against a protest by a purchaser thereunder; or

iv. for any other reason.

2. whether any of the above questions should be decided by the Commission by means of a general order or decided in individual cases after appropriate proceedings, including hearings; or should be left for decision by an appropriate court in each individual situation;

3. in the absence of reparation power under the Natural Gas Act, whether the Commission can force any purchaser receiving refunds under an invalid rate as herein mentioned to pass such refunds on to its customers, and if not, whether the ultimate consumers would benefit from any refunds retained by the purchaser to whom paid by a producer hereunder."

It is respectfully submitted that the Federal Power Commission cannot answer the foregoing questions without further consideration thereof by this Court. It is further submitted that by granting a writ in this case the Court may resolve these complex administrative problems that now plague a substantial segment of this very important industry.

B. The court below, in reversing the Commission, not only set aside the Commission's order but went further and modified the Commission's order. In so doing, the Court of Appeals exceeded its judicial function and invaded the administrative province. This unauthorized expansion of the judicial power of review conflicts with recent decisions of this Court and accordingly should be corrected by granting this Petition for Writ of Certiorari.

POINT I.

THE JUDGMENT OF THE COURT OF APPEALS IS PREDICATED UPON AN ERRONEOUS INTERPRETATION OF THE PANOMA CASE AND RESULTS IN A DECISION WHICH IS IN CONFLICT WITH OTHER DECISIONS OF THIS COURT.

1. The Decision of the Court Below Constitutes an Unwarranted Expansion of This Court's Decision in Natural Gas Pipeline Co. v. Panoma Corp., 349 U.S. 44 (April 11, 1955).

In determining that the lawful contract rate on June 7, 1954, for gas sold by Petitioner to Natural was 6.253¢ instead of the 9.8262¢ rate established by the Oklahoma minimum price law, the Court of Appeals assumed that the mere enactment of the Natural Gas Act in 1938 prevented the State of Oklahoma from subsequently regulating the

minimum price for gas taken from the Guymon-Hugoton Field despite the fact that the federal authority lay "dormant and unexercised prior to July 16, 1954." Inherent in this assumption is a limitation upon the power of a state to enter an order concededly necessary in the interest of conservation, prevention of waste and protection of correlative rights in a natural gas reservoir, even though the Federal Power Commission had made no attempt to regulate these matters. The court below based its assumption upon the decision of this Court in *Panoma*,[6] and erroneously relied upon that decision as determining that the Oklahoma minimum price law was invalid from its inception. This was an unwarranted expansion of the *Panoma* case. In *Panoma*, this Court did not say *when* the Oklahoma minimum price order became invalid; it simply determined that the minimum price law conflicted with the paramount federal jurisdiction over rates for natural gas which had been implemented by the Series 174 orders issued by the Federal Power Commission. There was no attempt to determine the retroactive invalidity of the Oklahoma minimum price law, and, indeed, that issue was not before the Court for decision, and was not urged in the arguments or briefs presented to the Court. It was mentioned by Mr. Justice Douglas in his dissent, but there is nothing in the briefs or record to show that this point was passed upon by the Court.

This Court has a long standing rule that it will not pass upon questions which are not presented in the proceeding which is before the Court. This was clearly illustrated by this Court's action in *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U.S. 175 (1950), where the Court refused to consider the effect of the Natural Gas Act on state mini-

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[6] Cited by the court below as *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma*, 349 U.S. 44 (1955), but for convenience hereinafter referred to as "Panoma."

mum price regulation. In fact, recently, this Court has stated that such issues are not to be entertained upon dubious presentations, and most certainly not when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably. See *Aircraft & D. Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 763 (1947).

The question of when the Oklahoma minimum price law became invalid was not material to the decision in the *Panoma* case and any mention thereof would have been *obiter dictum*. The sole question before the Court was whether the Oklahoma minimum price law could stand in face of the regulations which had been promulgated by the Federal Power Commission. This Court expressly stated that the result reached was controlled by the *Phillips* case in which the validity of prior state regulations was not discussed. An examination of both the *Panoma* and *Phillips* cases shows that they are readily distinguishable on the facts and issues presented and are not determinative of the question which is raised herein.

The composite effect of the *Panoma* decision was to vitiate the Oklahoma minimum price law, because federal jurisdiction had been implemented by the Series 174 orders promulgated by the Federal Power Commission during the summer and fall of 1954, and thus, *at that time*, the theretofore valid state regulations were superseded. It is therefore clear that the court below misread *Panoma* when it stated that "there was no longer even the semblance of a valid law, or lawful order which could modify the contract rate." The decision of the Court of Appeals places an erroneous construction upon the *Panoma* case, and as set out below, has resulted in a decision which conflicts with the decisions of this Court.

2. The Decision of the Court of Appeals Conflicts with the Decisions of This Court Which Sustain the Validity of State Regulatory Action "Where Federal Power Has Been Delegated But Lies Dormant and Unexercised."

The assumption by the court below that the mere existence of the Natural Gas Act made the Oklahoma minimum price order void *ab initio*, disregards and ignores the decisions of this Court which firmly establish that merely because Congress has vested regulatory power in a federal agency, that does not of itself displace state regulations if no federal standards are set. *H. P. Welch* Co. v. *New Hampshire*, 306 U.S. 79 (1939); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Terminal R. Assoc.* v. *Brotherhood of Trainmen*, 318 U.S. 1 (1943); *Northwestern B. T. Co.* v. *Nebraska State R. Co.*, 297 U.S. 471 (1936); *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U.S. 612 (1909). This fundamental principle underlying the demarcation between federal and state authority was cogently summarized in *Missouri P. R. Co.* v. *Larabee Flour Mills Co., supra*, where the Court stated:

> "On the other hand, it is said that Congress has already acted — has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. * * * In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

The guiding principles for determining whether federal regulation supersedes state regulation were clearly stated

by this Court in *Bethlehem Steel Co.* v. *New York Labor Rel. Bd.*, 330 U.S. 767 (1947). Ultimately, in each case, the effect of federal legislation on state regulation is a matter of congressional intent as derived from the statute itself, its primary purpose and the judicial construction that has been placed thereon. *Guss* v. *Utah L. R. B.*, 351 U.S. 1 (1957). In the *Guss* case, this Court was confronted with a problem very similar to the one which is presented here, and in determining that Congress preempted the field by merely enacting the National Labor Relations Act, the Court made the following statement:

> "'Our reading of Section 10(a) forecloses the argument based upon such cases as *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 83 L. Ed. 500, 59 S. Ct. 438, and *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U.S. 612, 53 L. Ed. 352, 29 S. Ct. 214, that 'where federal power has been delegated but lies dormant and unexercised,' *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* (330 U.S. at 775), the states' power to act with respect to matters of local concern is not necessarily superseded. *But in each case the question is one of congressional intent.* Compare *H. P. Welch Co.* v. *New Hampshire (U.S.), supra,* with *Napier* v. *Atlantic Coastline R. Co.*, 272 U.S. 604, 71 L. Ed. 432, 47 S. Ct. 207.' (Emphasis supplied.)"

Therefore, the crucial inquiry in this proceeding, and one which the court below failed to determine because of its erroneous interpretation of the *Panoma* case, is whether, by the enactment of the Natural Gas Act, Congress intended to curtail state power prior to the implementation of the paramount federal authority provided therein.

The principle is thoroughly established that state police power, otherwise valid, is superseded by federal action only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently

The contract rate could only be changed, then, (unless the parties consented) after a hearing by the Commission as to its lawfulness unless, as set out in the agreement itself, a valid law and lawful orders of regulatory bodies having jurisdiction over the parties affected it. It was expressly because of these elements that Natural, after the Oklahoma Commission had established a minimum rate and while its lawfulness was being litigated, paid the state-fixed purchase price under protest. When the United States Supreme Court found Oklahoma's action to have been unlawful and set the state commission order aside, there was no longer even the semblance of a valid law, or lawful order which could modify the contract rate. The contract rate, therefore, under the mandate of the Supreme Court must be held to have been the rate effective on June 7, 1954.

The Commission concedes in its brief on the question whether Dorchester's effective rate on June 7, 1954 was 9.8262¢ or 6.253¢ "that forceful arguments can be made in support of either rate." The Intervenor admits, as it must, that Mobile prevents "the filing of an increase in the contract rate by unilateral action". However, it insists that because the Oklahoma order had not yet been found unlawful on June 7, 1954, the rate established by that order became the effectively filed rate for all purposes despite the fact that Natural then, and unceasingly from then on, denied Oklahoma's jurisdiction and expeditiously brought the issue to the United States Supreme Court where its position was completely vindicated. The Commission itself had specifically recognized the situation for what it was. It had accepted the filing by Dorchester of the Oklahoma price, contingent upon the eventual decision of the Supreme Court as to just what was the effective lawful rate for the purchase and sale of gas be-

tween Natural and Dorchester on June 7, 1954. That has now been determined. No amount of facile argument can hide the fact that the contract rate was the effective lawful rate and must be so accepted by the Commission and Dorchester.

The suggestion of the Commission and intervenor that this point was not made before the Commission in the applications for rehearing as called for by Section 19(b) of the Act, is frivolous. Natural throughout this labyrinthian process had urged to the Commission that its contract rate could not be destroyed unilaterally. This was squarely within the record and was a most important part of Natural's objection to the increase from the time Dorchester filed the Oklahoma Commission order to its objection to the Commission allowing the filing of December 27, 1955 to become effective. It was an express ground upon which the petition for rehearing of the January 5, 1956 order was based. The language of the Supreme Court in its Mobile opinion could hardly have been quoted in any of those objections as the opinion was not filed until February 27, 1956. But the rationale of the Mobile holding was present in all of Natural's protests. The Commission and Dorchester had full notice from the time the Oklahoma rate was filed by the intervenor of the claim by petitioner that such move was illegal and would be contested. The Commission's order of November 30, 1954, above referred to, accepting for filing the state commission price order reveals total knowledge of the circumstances. It said in that order:

> *"In view of the foregoing, it appears to the Commission that the question of whether the price of 9.862c per Mcf at 14.65 psia is the effective price as of June 7, 1954, for the sale of gas by Dorchester to Natural, as claimed by the former, is dependent upon whether*

the aforesaid Order No. 26096 of the Corporation Commission of the State of Oklahoma is valid as to such sale. That question is presently before the Supreme court of the United States in Cause No. 321, October Term 1954 for decision.

"To protect the respective rights of both Dorchester and Natural, it is appropriate to carry out the provisions of the Natural Gas Act that we permit the filing by Dorchester of the tenders of October 28, 1954, subject to the express understanding and condition that such filing is proper only if Order No. 26096 is valid as to the sale by Dorchester to Natural covered by the filings, but not otherwise." (Emphasis supplied.)

Much the same so-called technical objection is argued by the Commission with respect to petitioner's attack on the Commission's action of February 24, 1956. The petitioner, says the Commission, failed to file application for rehearing under Section 19(a). As has been noted in the statement above, it was the Commission which deliberately and authoritatively designated petitioner's protest telegram of February 8, 1956 as its application for rehearing and accepted it as such. The telegram plainly put the Commission on adequate notice of petitioner's objections. Amazing as this litigation was in its development, petitioner can hardly be held for a failure to anticipate a trap. It had the right to rely on the Commission's February 24th designation of its earlier letter protest as an application for rehearing, high-handed though that designation may have been. At this stage the Commission cannot in good faith strive to construe § 19(a) as requiring a petition for rehearing of a summary denial of a rehearing. Review would never become available to an aggrieved party by that line of reasoning.

The Commission also contends that petitioner was not aggrieved by its February 24th order. The Commission

says the 9.8262¢ rate that it permitted to be filed by its letter authorization and which it confirmed by the order of February 24th effected no change in the rate it had allowed on January 5, 1956. Consequently, the Commission now argues, it had no power under the Act to sanction that move, whatever the purpose of the move may have been. But obviously if the January 5th order were reversed, it could and probably would be claimed that the February approval established a sound nine cent rate from January 27, 1956 when the thirty day notice time elapsed. In this light the aggrievement to petitioner by the Commission's acceptance of the filing cannot reasonably be denied. And the voiding of that step is not to be defeated by the hint that the Commission decision in the form of a letter does not meet with the requirements of Section 19(b) as to that body's method of decision. What we have is the considered Commission final judgment on Dorchester's December 28th filing. The Commission emphatically reiterated that view when it accepted petitioner's telegram as an application for rehearing of its decision, directly under Section 19(a). For the third time it solemnly attested to this when it made its order denying the rehearing application. We are wholly satisfied that the form of the decision of the Commission is well within Section 19(b).

By its order of November 14, 1955 the Commission reversed the holding of its Presiding Examiner and reduced Dorchester's bond from $742,000 to $41,000. As we have seen, petitioner was entitled to protection on the difference between the six cent rate and the Oklahoma nine cent price. The $742,000 was designed to furnish this. The declared purpose of the $41,000 bond was to safeguard petitioner should the rate be ultimately determined as 9.8262¢ instead of ten cents. The reversal of the finding of the Presiding

Examiner was erroneous but since we are now holding that the proper rate on June 7, 1954 was 6.253¢ there is no need of ordering a replacement bond in some adequate sum.

Finally, respondent and intervenor by motion to dismiss and on the merits maintain that petitioner is not aggrieved by any of the Commission orders involved.

We have dealt with the order of February 24, 1956 immediately above. Other than it, the argument seems to be that because the advance in the price to Natural has been reflected in the price to its customers, Natural has not been aggrieved.[8]

This proposition is at the least, unrealistic. Natural is entitled to deal with its customers ethically and, engaged in a fiercely competitively business as it is, must do so in order to survive. It could not stand by and suffer an unlawful fifty-seven per cent increase to be loaded on its purchasers. There is no indication that the latter are captive buyers or that they would submit to that sort of treatment. So it has been not only high level business but sound business for Natural to contest the issue. All in all Natural is truly an aggrieved person within § 19(b) of the Act.

The motion to dismiss is denied.

Since our basic conclusion is that the lawful contract rate on file June 7, 1954 was 6.253¢ per Mcf:

The Commission's order of January 5, 1956 is modified so as to provide that effective as of the date thereof, the rate of 6.253¢ per Mcf be reinstated as the effective rate

[8] Natural is committed formally to the Commission to refund to its customers in turn any refunds it collects from Dorchester. Natural's distributor customers in turn have agreed with the Illinois Commission to pass the refunds along to its customers, the ultimate consumers.

for the period prior to March 1, 1955. Paragraph (D) of said order is modified so as to direct that the refund to be made by Dorchester to petitioner pursuant thereto be computed on the basis of the difference between 10¢ per Mcf and 6.253¢ per Mcf for the period from March 1, 1955 to January 5, 1956.

The order of February 24, 1956 is set aside and the Commission is directed to rescind its action as reported in its notice of February 3, 1956 and to reject the filing tendered by Dorchester on December 27, 1955 and to strike Supplement #6 from its files.

In accordance with the present position of petitioner in respect to the arrangements as to its payments in excess of the contract price since January 5, 1956, we are making no specific order concerning those payments.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B"

[1401]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby, Frederick Stueck and William B. Connole

In the Matter of Dorchester Corporation } Docket No. G-6505

Order Reversing Initial Decision of Presiding Examiner

On September 14, 1955, the Presiding Examiner issued his initial decision, setting forth his findings, conclusions and decision on the determination of the amount of the surety bond which Dorchester Corporation (Dorchester) should be required to furnish in connection with its proposed rate changes which it sought to place into effect under bond. In reaching his conclusion as to the amount of the bond, the Presiding Examiner found and concluded on the basis of the record adduced that Dorchester's effective rate as of June 7, 1954, under Dorchester's Rate Schedule FPC No. 2, was 6.253 cents per Mcf (at 14.65 psia), and that the annual differential between revenues at 6.253 cents and the proposed 10c rate for the 12-month period following March 1, 1955 (the date on which the proposed 10c rate was permitted to become effective) would amount to approximately $742,000.

On October 4, 1955, Dorchester filed exceptions to said initial decision.

In our order of November 30, 1954, we, in an effort to avoid taking any steps which would affect either party's rights or status in their pending litigation concerning the validity of the Oklahoma minimum price orders, stated that:

> "In view of the foregoing, it appears to the Commission that the question of whether the price of 9.8262¢ per Mcf at 14.65 psia is the effective price as of June 7, 1954, for the sale of gas by Dorchester to Natural, as claimed by the former, is dependent upon whether the aforesaid Order No. 26096 of the Corporation Commission of the State of Oklahoma is valid as to such sale. That question is presently before the Supreme Court of the United States in Cause No. 321, October Term 1954 for decision.
>
> "To protect the respective rights of both Dorchester and Natural, it is appropriate to carry out the provisions of the Natural Gas Act that we permit the filing by Dorchester of the tenders of October 28, 1954, subject to the express understanding and condition that such filing is proper only if Order No. 26096 is valid as to the sale by Dorchester to Natural covered by the filings, but not otherwise."

[1402]

It is now clear that the precautions which we attempted to take were improper and of no avail. There can be only one filed rate under which a particular sale may be made. The rate which was filed was the 9.8262¢ rate which was the rate which actually was effective and was being paid by Natural to Dorchester's predecessor on June 7, 1954. Therefore, this filing complied with our Order 174-A. *See In the Matter of Cities Service Producing Company*, G-5788.

A policy of accepting rate filings tentatively, subject to later and final acceptance of the rate we found to be the

in the event the state minimum rate was finally declared illegal by the Supreme Court. On November 30, 1954 the Commission accepted for filing Dorchester's tender, on the condition that the 9.8262¢ per Mcf minimum price be upheld by the United States Supreme Court. Thereafter Natural paid for its gas at that rate reserving the right to recover the excess if it were found to be unlawful.[5]

On December 6, 1954, Dorchester presented for filing its Supplement #4 which called for a rate of 10¢ per Mcf under the contract. The Commission suspended this proposed change until March 1, 1955, and called for a hearing as to its lawfulness. On April 7, 1955, four days before the Supreme Court filed its opinion invalidating the state-fixed rate, on Dorchester's motion, the Commission by order permitted the ten cent rate to become effective as of March 1, 1955. This was subject to further order of the Commission after the above referred to hearing and contingent upon Dorchester posting a $41,000 bond covering refund of any portion of the increase eliminated by the Commission as a result of the hearing. Because the required bond merely took care of any difference between the Oklahoma Commission minimum of 9.8262¢ and the sought for ten cent figure, Natural asked that the Commission reconsider the amount of the bond and that it be made sufficient to protect the difference between the contract 6.253¢ and the ten cents allowed Dorchester. It was about this time that the Supreme Court on April 11, 1955, holding Phillips Petroleum Co. v. Wisconsin to be controlling, ruled the 9.8262¢ rate invalid as having been imposed beyond the power of the State. Natural Gas Pipeline Com-

[5] Natural has presently a suit in the Delaware Federal District Court to obtain refund of its excess payments from July 1, 1954 to March 1, 1955.

pany of America v. Corporation Commission of the State of Oklahoma, 349 U.S. 44 (1955).[6] Thereafter a hearing was held on Natural's protest at the inadequacy of the bond to be required of Dorchester pending the Commission's determination of entitlement to the 10¢ rate. On September 14, 1955 the Presiding Examiner of the Commission sustained the protest and ordered a bond in the sum of $742,000. On November 14, 1955 while the uncompleted hearing on the lawfulness of the ten cent rate was in recess, the Commission reversed its Presiding Examiner and reinstated the $41,000 bond. It did so simply by stating that the 9.8262¢ rate was the one actually effective and being paid on June 7, 1954. The facts that it was under protest, that a lesser amount was paid for a short time thereafter, or that the rate was subsequently declared invalid were, according to the Commission, irrelevant to the determination of the effective rate on June 7, 1954. The Commission in fact rejected its earlier conditional acceptance of the 9.8262¢ rate as having been a condition improvidently granted. Thereafter, in view of this, when the ten cent rate hearing was resumed Dorchester withdrew its filing of that rate. It was agreed by everyone that all the evidence as to that question had been offered and that the record was closed. The intermediate decision was omitted on motion and the record certified to the Commission. The latter, on January 5, 1956, dismissed the ten cent rate and reinstated the 9.8262¢ rate, relying apparently on the November 14th order which had found that to be the effective rate on June 7, 1954. Dorchester was ordered

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[6] See Michigan Wisconsin Pipe Line Co. v. Corporation Commission of Oklahoma, U.S. (January 27, 1958); Phillips Petroleum Co. v. Corporation Commission of Oklahoma, U.S. (January 27, 1958) and Cities Service Gas Co. v. State Corporation Commission of Kansas, U.S. (January 20, 1958).

to refund the difference between the ten cent amount paid and 9.8262¢, from the date of the allowance of the ten cents. The Commission in this fashion made it clear that so far as it was concerned the 9.8262¢ rate was the one effective and applicable on June 7 1954. Thus Natural was deprived of its contract rate through a unilateral filing of a higher rate by Dorchester, with no hearing or finding by the Commission — the only regulatory agency with authority over the contract rate — as to the illegality of that rate.

Another move in this astonishing sequence of events had occurred on December 27, 1955, when Dorchester "[t]o remove any uncertainty with respect to the status of the rate proceeding * * * " filed a 9.8262¢ rate to be effective as of March 1, 1955. Natural objected to this procedure. The Commission referred to it in its January 5, 1956 order but did nothing else regarding it, and acted as above outlined. On February 3, 1956, the Commission by letter stated that it had decided to treat the December 27, 1955 filing as Supplement #6 (there was no Supplement #5) to be effective at the expiration of the thirty days statutory notice which had elapsed January 27, 1956, and that the 9.8262¢ rate became effective on that date. Once more Natural objected. On February 24, 1956, the Commission, accepting that protest as an application for rehearing on its February 3rd decision, denied it.

In our endeavor to ascertain the legal rate on June 7, 1954 for the gas contracted for by Natural from Dorchester we start with the governing law laid down by the Supreme Court in its Mobile decision.[7] Under that law a unilateral filing of a new rate by one party cannot, over the protest of another party, annul the rate established by contract between the parties. The fact that the Mobile case dealt with

[7] United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332 (1956).

an attempt to supersede an already filed rate and that the instant case is concerned with the filing of an initial rate is an immaterial difference. The court pointed out at page 344 that "* * * denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission * * * to modify them when necessary in the public interest." The shortcoming here has been that the Commission made no attempt to find what was in the public interest. The Court in Mobile further indicated, page 344, that while natural gas companies are precluded "* * * from unilaterally changing their contracts simply because it is in their private interests to do so, * * *" they nonetheless have under § 5(a) of the Natural Gas Act. * * * an avenue of relief when their interests coincide with the public interest." Thus while they understandably are "* * * not given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing to the Commission any relevant information and requesting it to initiate an investigation on its own motion. And if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5(a) authorize the natural gas company to file a schedule increasing the rate." But the Court declared in the related case of Federal Power Commission v. Sierra Pacific Power Company, 350 U.S. 348 (1956) 354-5, that the contract rate is not necessarily unreasonable because it yields less than a fair return. Though it is true that the Commission may not normally impose a rate affording less than a fair return, it does not follow that the Commission is required to relieve a company of an improvident bargain which affords less than a fair return.

Also Dorchester should be required to refund to Natural the increase based upon the difference between 10 cents and 9.8262 cents per Mcf plus interest at the rate of 6% per annum on such difference from dates of payments by Natural to the date of refund.

The Commission *orders:*

(A) The increase inrates and charges proposed by Dorchester Corporation by Supplement No. 4 to its FPC Gas Rate Schedule No. 2 filed on December 6, 1954, be and the same is hereby dismissed, and said filing shall have no force or effect.

(B) Effective as of the date of issuance hereof the permission heretofore granted in the Commission's order issued April 7, 1955, that Dorchester Corporation provisionally collect and receive, subject to bond, the increased rate provided for by Supplement No. 4 to its FPC Gas Rate Schedule No. 2, shall cease and terminate.

(C) Effective as of the date of issuance hereof, the rates and charges provided in Supplement No. 3 to Dorchester Corporation FPC Gas Rate Schedule No. 2, as effective prior to the filing of Supplement No. 4, is hereby reinstated.

(D) Within 30 days from the date of issuance of this order Dorchester Corporation shall make refund to Natural Gas Pipeline Company of America of the increase based upon the difference between 10¢ and 9.8262¢ per Mcf plus interest at the rate of 6% per annum on such difference from the dates of payment by Natural to the date of refund, and shall report to the Commission in writing and under oath, in quadruplicate, within 15 days after the making of such refund, the amount of refund, the dates covered by the refund, the billing units and all other pertinent data. If agreeable to Natural, such refund may be accomplished by the issuance by Dorchester of appropriate

credit memorandum to Natural, subject to the requirements of this paragraph.

(E) Dorchester's letter dated November 15, 1955 is hereby rejected.

(F) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act; nor shall it be construed as constituting approval by this Commission of any service agreement, rate, charge, classification, or any

[1441]

rule, regulation or practice affecting such service agreement or rate; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service agreement or rate.

By the Commission. Commissioner Draper dissenting.

J. H. GUTRIDE

J. H. Gutride
Acting Secretary

[1455]

FEDERAL POWER COMMISSION
Washington 25

Feb. 3, 1956

Vinson, Elkins, Weems & Searls
Esperson Building
Houston 2, Texas

Gentlemen:

This is to advise you of the acceptance for filing of your "Rate Filing" received by the Commission on December 27, 1955 with your letter of transmittal dated December 23, 1955. For purposes of identification the filing has been assigned the following designations.

Dorchester Corporation
Supplement No. 6 to
FPC Gas Rate Schedule No. 2

The Commission considered your proposal to make this supplemental rate schedule effective as of March 1, 1955 but took no action to grant the necessary waiver of statutory notice to establish such effective date. Consequently such supplement became effective January 27, 1956 upon expiration of 30 days statutory notice.

The foregoing acceptance shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the "Rate Filing"; nor shall it be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding

now pending or hereafter instituted by or against your company.

Commissioners Draper and Connole stated that in view of the action taken by the Commission in the order adopted December 30, 1955 and issued January 5, 1956, in the adoption of which Commissioner Connole did not participate and Commissioner Draper dissented, and more specifically paragraph (C) of the order, Supplement No. 3 to Dorchester Corporation FPC Gas Rate Schedule No. 2 has been reinstated; that the instant rate filing is therefore superfluous and should be rejected.

Very truly yours,

LEON M. FUQUAY
Secretary

cc: Natural Gas Pipeline Company of America
20 North Wacker Drive
Chicago, Illinois

[1461]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby, Frederick Stueck and William R. Connole.

In the Matter of Dorchester Corporation }

ORDER DENYING APPLICATION FOR REHEARING

Adopted: February 15, 1956 Issued: February 24, 1956

Natural Gas Pipeline Company of America (Natural), on February 8, 1956, filed a protest which is herein construed to be an application for rehearing of the notice of the Secretary dated February 3, 1956. The aforesaid notice made effective as of January 27, 1956, Supplement No. 6 to Dorchester Corporation's FPC Gas Rate Schedule No. 2, tendered for filing on December 27, 1955. The supplement covers the sale of natural gas by Dorchester Corporation to Natural, subject to the jurisdiction of the Commission.

Natural asserted that the filing is "not in conformity with the statute and the Commission's established rules," and requested the filing be stricken from the Commission's files and rejected. In substance, the application for rehearing reiterates representations filed with the Commission by Natural on January 3, 1956, concerning the December 27, 1955 tendered filing of Dorchester Corporation.

The Commission *finds:*

The assignments of error and grounds for rehearing set forth no new facts and no principles of law which either were not fully considered by the Commission

when it permitted the aforesaid Supplement No. 6 to Dorchester Corporation's FPC Gas Rate Schedule No. 2 to become effective, or which having now been considered, warrant any change in, or modification of, the Commission's action of February 3, 1956.

The Commission *orders:*

The application for rehearing filed by Natural Gas Pipeline Company of America on February 8, 1956, is hereby denied. By the Commission. Commissioners Draper and Connole dissenting.

LEON M. FUQUAY

Leon M. Fuquay,
Secretary.

APPENDIX "C"

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations,

or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a pro-

ceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. §717c]

ADMINISTRATION; POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such others, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different

date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. §717o]

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding

may obtain a review of such order in the circuit court of appeals of the United States[8] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file

[8] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

proper one, would be unworkable administratively, and would be of questionable legality, particularly in view of Sec. 154.101 which provides that acceptance for filing of any rate schedule is not to be construed as approval.

The fact that the 9.8262¢ rate was paid under protest, or that a lesser amount was paid for a while shortly thereafter, or that the basis for the 9.8262¢ rate (the Oklahoma minimum price order) subsequently has been determined to be invalid, or any other facts pertaining to the equities between the parties does not require or permit us in this proceeding, to determine what the lawful or the just and reasonable rates should have been on June 7, 1954. The 9.8262¢ rate was the "effective rate" on June 7, 1954, within the meaning of Order No. 174-A.

The filing of this rate and our acceptance thereof for filing constitutes compliance with our order, but does not constitute a determination of the proper contractual rate of the just and reasonable rate. In order that all parties similarly situated may be treated alike, insofar as possible, the filed rate must be compared with the increased rate filed later, for the purpose of determining the amount of the bond which Dorchester must file, in order to place and keep its increased rates in effect. We therefore conclude that the bond now filed, in the amount of $41,000, is proper.

We have no power to award reparations and cannot fix rates retroactively. Consequently, our authority to require Dorchester to reduce rates or refund to Natural is limited to the period commencing on March 1, 1955, when the suspended 10¢ rate became effective, subject to refund under bond.

The Commission *finds:*

The bond heretofore filed by Dorchester in the amount of $41,000 is proper.

[1439]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby, and Frederick Stueck.

In the Matter of Dorchester Corporation } Docket No. G-6505

ORDER DISMISSING PROCEEDINGS

Adopted: December 30, 1955 Issued: January 5, 1956

On December 6, 1954, Dorchester Corporation (Dorchester), an independent producer, tendered for filing Supplement No. 4 to its FPC Gas Rate Schedule No. 2, providing for an increase in its rate to ten cents per Mcf for natural gas sold to Natural Gas Pipeline Company of America (Natural), produced in the Guymon-Hugoton Field, Texas County, Oklahoma.

By order issued December 29, 1954, the Commission suspended the proposed change in rates until March 1, 1955, and ordered a hearing therein on a date to be fixed by further order of the Commission. Thereafter Dorchester filed a motion, pursuant to Section 4 of the Natural Gas Act (Act) to place said new rate into effect under a bond; and by order issued April 7, 1955, the Commission permitted the proposed 10-cent rate to become effective as of March 1, 1955, subject to the filing by Dorchester of a corporate surety bond to assure refund of any portion of such increased rate which the Commission might ultimately find not to be justified.

Pursuant to Commission order issued September 28, 1955, hearings were held with respect to the lawfulness of the proposed increased rate contained in said Supplement No. 4. After the hearings, on December 23, 1955, we issued an order omitting the intermediate decision procedure, and pursuant thereto the Presiding Examiner certified to us the record in this proceeding.

Thereafter, on December 27, 1955, Dorchester filed as its rate to be effective as of March 1, 1955, the date of expiration of the suspension of Dorchester's proposed change in rates embodied in its aforesaid Supplement No. 4, the rate of 9.8262¢, which the Commission has heretofore found to be the effective rate on June 7, 1954, within the meaning of Order No. 174-A. Dorchester stated that upon acceptance of this rate by the Commission, Dorchester will promptly issue an appropriate credit memorandum to Natural for the difference between the payments made by Natural at the 10¢ rate and 9.8262¢ rate, plus interest at 6% per annum on such amount from the date of payment to the date of the issuance of such memorandum. The stated purpose of this filing was "to remove any uncertainty with respect to the status of the rate proceeding" in this docket, and to "settle and terminate all matters" herein.

[1440]

Under the authority contained in Sections 4, 16 and complementary provisions of the Act, the termination of this proceeding is proper since it permits the orderly and expeditious disposition of a matter the continuation of which would serve no further purpose, in a manner consonant with the proper and efficient exercise of our functions under the Act and with the interests of the parties and the public.

In view of the foregoing, Dorchester's letter filed with the Commission on November 15, 1955, should be rejected.

FILED
JUN 18 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1003

DORCHESTER CORPORATION,

Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
FEDERAL POWER COMMISSION,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1957

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DORCHESTER CORPORATION,

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NATURAL GAS PIPELINE COMPANY OF AMERICA,
FEDERAL POWER COMMISSION,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Petition for Writ of Certiorari heretofore filed in this proceeding by Dorchester Corporation ("Dorchester") is predicated upon two fundamental issues which may be summarized as follows:

(1) As a result of the decision by this Court in the *Phillips* case, Petitioner was required to file the contract price it was receiving from Natural Gas Pipeline Company of America ("Natural") on June 7, 1954. The contract provided for a price of 6.253¢ per Mcf, but was subject to lawful state regulatory orders. Therefore, on that date, Natural was paying a price or 9.8262¢ per Mcf pursuant to the Oklahoma minimum price law. However, in *Natural Gas Pipe-*

line Co. v. *Panoma Corp.*, 349 U.S. 44 (April 11, 1955), this Court held such minimum price law invalid because it conflicted with the implementation of the paramount federal jurisdiction by the Federal Power Commission in its Order No. 174, issued July 16, 1954. Therefore, in order to ascertain what the contract price was on June 7, 1954, it is necessary to first determine whether or not the Oklahoma minimum price law constituted a valid exercise of state regulatory power over matters of local concern prior to the issuance of Order No. 174. We do not believe that this question has been considered by this Court.

(2) In reversing the Commission's order, the Court of Appeals not only set aside such order but also dictated subsequent Commission action to be taken with respect thereto by modifying the Commission's orders so as to determine the manner and method of refund to be made without giving the Commission an opportunity to determine how such refund should be made or whether or not the rate reinstated (6.253¢ per Mcf) was so low as to have an adverse effect on the public interest. In so doing, the Court of Appeals usurped the administrative function and rendered a decision directly in conflict with a recent decision of another Court of Appeals on the same matter.

I.

Natural has filed a brief in opposition to the Petition for Certiorari. In its brief, Natural asserts that this Court has already determined that Congress preempted the field by enacting the Natural Gas Act in 1938 and thereby precluded state regulation. Therefore, Natural concludes the Oklahoma minimum price law was void ad initio. As authority for this contention, Natural refers to this Court's opinion in *Natural Gas Pipeline Company of America* v. *Panoma Corp., supra.* We disagree with Natural's interpretation of

the *Panoma* case. If Natural's interpretation is correct, then the first ground asserted above as a basis for our Petition for Certiorari is without merit. However, if Natural's interpretation is erroneous, and this Court has not considered the question of the retroactive effect of its decision in the *Panoma* case, then, as pointed out in our petition, that is a matter of industry-wide importance which should be determined by this Court.

II.

Rule 19(b) of the Supreme Court Rules provides that one of the situations in which this Court is likely to grant a writ of certiorari is "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." We believe that the action of the Court of Appeals in this case in modifying the Commission's order so as to determine the manner and method of refund to be made by Petitioner without giving the Commission an opportunity to determine how such refund might be made, or to determine whether or not the rate reinstated (6.253¢ per Mcf) was so low as to have an adverse effect on the public interest, is in direct conflict with the decision rendered by the Court of Appeals for the Tenth Circuit in *Cities Service Gas Company* v. *Federal Power Commission*, decided May 14, 1958. For the convenience of the Court that opinion is printed in the Appendix attached hereto. The fact situation and legal issues presented in the *Cities Service* case are coincident with those which confronted the Court of Appeals in this case. There, the Tenth Circuit held that the Commission erred in filing the rate established by the Kansas minimum price law as the rate in effect on June 7, 1954, but the court did no more and expressly stated:

> "Our duty is to merely set aside the order of the Commission accepting the filed rate and to direct the

with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. §717r]

APPENDIX "D"

Address All Communications
To The Secretary

FEDERAL POWER COMMISSION

WASHINGTON 25

April 28, 1958

Docket No. R-168
Notice of Proposed Rulemaking
TO THE PARTY ADDRESSED

Gentlemen:

Enclosed is the notice issued by the Commission today in the above-entitled matter.

Very truly yours,

/s/ JOSEPH H. GUTRIDE,
Secretary.

Enclosure

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-168

Nonacceptability of Rate Filings Based Upon State-Prescribed Minimum Prices

NOTICE OF PROPOSED RULEMAKING

(April 28, 1958)

Notice is hereby given that the Commission has under consideration the issuance of a statement of general policy in the above-entitled matter.

On January 20, 1958, the Supreme Court, in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and *Natural Gas Pipeline Co.* v. *Panoma*, 349 U.S. 44), vacated a judgment of the Supreme Court of Kansas thereby holding, in effect, that the State of Kansas cannot lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, either at the wellhead or after production and gathering. A week later the Court, citing the *Cities Service* case, reversed the Oklahoma Supreme Court which had erroneously applied the holding in the *Panoma* case, *supra*, to sales of residue gas only and not to sales at or near the wellhead. *Michigan Wisconsin Pipe Line Co.* v. *Corporation Commission of Oklahoma*, 355 U.S. 425.

It follows from the decisions in these cases that rate filings made pursuant to Section 4 of the Natural Gas Act and Part 154 of the Regulations under the Natural Gas Act may have no legal basis to the extent that such filings are predicated solely on State-prescribed prices of the nature described above.

Although, under Section 4 (a) of the Administrative Procedure Act, no general notice of proposed rulemaking is required where a statement of general policy is proposed to be issued, the Commission is cognizant of the importance of the decisions of the Supreme Court and any statement that it might issue in this regard. It, therefore, is taking this method of informing the public and interested parties that it is proposing to issue a statement substantially as follows as an amendment of its general rules, Part 2 — General Policy and Interpretations, and possibly other statements or take other actions;

§2.56. *State-prescribed minimum prices for natural gas.* Since the Supreme Court has held, in effect, that States cannot lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, the Commission will reject any tender for filing pursuant to Section 4 of the Natural Gas Act which would initiate or change the price for the sale of natural gas in interstate commerce for resale to the extent that such filing is based upon a State-prescribed or attributed minimum price. (E.g., Gas Price-Fixing Order of State Corporation Commission of Kansas, entered December 2, 1953 or the corresponding order of the Corporation Commission of Oklahoma.)

Among those questions which the Commission is considering in this connection which appear to be raised by the decisions of the Supreme Court referred to, are:

1. whether any rate filing predicated solely upon a State minimum price order which has been declared invalid by the United States Supreme Court —

a. must now be regarded as having been invalid from the date of filing; or

b. must now be regarded as having become invalid upon the issuance on January 20, 1958 of the decision of the Supreme Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, or on March 12, 1958, when the mandate of the Supreme Court was issued in that case; or

c. must now be regarded as having become invalid on the happening of some other event; or

d. must be regarded as still effective;

i. by reason of failure of the purchaser thereunder to protest the filing; or

ii. by reason of an agreement, expressed or implied, to pay the filed rate;

iii. by reason of legal estoppel against a protest by a purchaser thereunder; or

iv. for any other reason.

2. whether any of the above questions should be decided by the Commission by means of a general order or decided in individual cases after appropriate proceedings, including hearings; or should be left for decision by an appropriate court in each individual situation;

3. in the absence of reparation power under the Natural Gas Act, whether the Commission can force any purchaser receiving refunds under an invalid rate as herein mentioned to pass such refunds on to its customers, and if not, whether the ultimate consumers would benefit from any refunds retained by the purchaser to whom paid by a producer hereunder.

The statement of general policy and the order herein described are proposed to be issued under the authority granted to the Federal Power Commission by Sections 4 and 16 of the Natural Gas Act (52 Stat. 822, 830; 15 U.S.C. 717c, 717o).

Any person may submit to the Federal Power Commission, Washington 25, D. C., not later than May 27, 1958, data, views, comments, and suggestions in writing concerning the proposed statement and order. An original and nine copies of any such submittal should be filed. The Commission will consider any such written submittals before acting on the proposed statement and order.

/s/ JOSEPH H. GUTRIDE,
Secretary.

> Commission to strike supplement no. 26 from its files. Our authority is then exhausted. Cf. *Sun Ray Mid-Continent Oil Co.* v. *F. P. C.*, 353 U.S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794".

In so limiting its function on review, the Tenth Circuit was merely following the mandate of this Court in *Sun Ray Mid-Continent Oil Company* v. *F. P. C.*, 353 U.S. 944 (1957), where it was stated:

> "The power of the Court of Appeals in reviewing the order of the Federal Power Commission was exhausted when it held that the Commission had authority under Section 7(c) and (e) of the Natural Gas Act to issue certificates of public convenience and necessity of limited duration. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80."

We believe that the conflict between the action taken by the Court of Appeals in this case and the opinion rendered by the Tenth Circuit in the *Cities Service* case is clearly apparent, and that therefore, this Petition for Writ of Certiorari presents a question within the purview of Rule 19(b) of the Supreme Court Rules. Accordingly, we submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GENE M. WOODFIN, one of the Attorneys for Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of June, 1958, I served copies of the foregoing Reply Brief on Counsel of Record for Respondents at the following addresses:

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.....
GENE M. WOODFIN

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5666

CITIES SERVICE GAS COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent,

MAGNOLIA PETROLEUM COMPANY,

Intervenor.

PETITION TO REVIEW ORDER OF THE FEDERAL POWER COMMISSION

Decided May 14, 1958

Before PICKETT, LEWIS AND BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

The petitioner, Cities Service Gas Company, seeks to review and thereupon to set aside an order of the Federal Power Commission issued March 21, 1957, as modified May 17, 1957, accepting for filing a rate schedule submitted by the intervenor, Magnolia Petroleum Co. Authority for review is found in Section 19(b) of the Natural Gas Act, 15 U.S.C.A. 717r (b).

The Commission accepted the rate schedule as filed pursuant to the provisions of Section 4 (e) of the Natural Gas Act, 15 U.S.C.A. 717c (e) and the pertinent regulations, 18 C.F.R. 154.92 (a) and 154.93. The filing included a gas pur-

chase contract entered and executed by petitioner and Magnolia on June 17, 1946, which provided for a sale of gas at a basic six cents per Mcf 16.4 p.s.i.a., and an order of the Kansas Corporation Commission, effective January 1, 1954, which set an eleven-cent minimum price, 14.65 p.s.i.a., on gas produced from the field covered by the contract. The Commission order was filed as Supplement 26. At such time petitioner had unsuccessfully attacked the authority of Kansas to regulate rates upon gas purchased for resale in interstate commerce, Cities Service Gas Co. v. Kansas Corporation Commission, 180 Kan. 454, 304 P. 2d 528, but the subsequent reversal of the Kansas holding by the United States Supreme Court, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355, premises petitioner's present contentions. In harmony with the earlier holdings of Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, and Natural Gas Pipeline Co. of America v. Panoma Corp., 349 U.S. 44, 75 S. Ct. 576, 99 L. Ed. 866, the U.S. Supreme Court found the Kansas Corporation Commission without authority to set rates upon the gas herein involved. The eleven-cent rate as evidenced by Supplement 26 was thus determined to be an invalid compulsion upon petitioner and Magnolia.

Since the issuance of the Kansas Corporation Commission order of January 1, 1954, petitioner has paid the eleven-cent under protest and in furtherance of its protest instituted an action against Magnolia in the U. S. District Court for the District of Kansas in which a determination of contract rights was sought. Pursuant to an order of that court, payments since July 22, 1955, have been made into court and the court has paid over to Magnolia amounts equal to the six-cent contract price and has impounded the remainder of the eleven-cent payment. The District Court action is still pending.

Magnolia's tendered rate schedule was accepted for filing by the Federal Power Commission on March 21, 1957, with recognition of the parties' existing controversy worded "subject, however to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for Magnolia Petroleum Company or by or for Cities Service Gas Company in pending litigation concerning this particular sale of gas." Both companies petitioned for rehearing and clarification and the Power Commission then issued its order of May 17, 1957, "Modifying Order Accepting Rate Schedule for Filing and Denying Petitions for Rehearing." The modification to the original order was the removal of the condition set out above. Petitioner's further efforts for rehearing were rejected because "there is no provision under the Natural Gas Act nor in the Commission's rules for applications for rehearing of orders denying rehearing."

In support of review, petitioner now urges that the Power Commission erred in accepting the eleven cent state-ordered minimum price as the rate to be paid by petitioner on and after June 7, 1954;[1] that the decision in Cities Service Gas Co. v. Kansas Corporation Commission, supra, rendered

[1] Petitioner argues here that the Kansas Corporation Commission order, in view of earlier decisions of the U. S. Supreme Court was so patently invalid that the Federal Power Commission erred in giving any cognizance to the order and should have rejected it when filed by Magnolia. We reject that argument. On the pertinent date, June 7, 1954, the authority of the Kansas Commission had been upheld by the Kansas Supreme Court, the highest judicial body that had then considered the precise question involved. It was not the function of the Federal Power Commission to pass upon the question of whether or not the Kansas Supreme Court was in error. Good administrative policy dictates otherwise. The inherent difficulties that may arise from a later change in judicial interpretation are not attributable to administrative fault. Our books of law carry many cases requiring reversal of a lower court by reason of a change occurring between trial and appeal.

the order of that commission void ab initio; and that this court should adjudicate the contract price and effective rate as of June 7, 1954 to be six cents. The respondent Commission answers that the acceptance of a rate schedule for filing is not a determination by the Commission as to the validity or reasonableness of the rate and that the order complained of was merely procedural and interlocutory and not subject to review; the Commission concedes that petitioner should receiver, in a proper action, any excess payments but contends that the Kansas order is and always has been but a nullity in the filing and cannot be the basis for any relief to petitioner. Magnolia urges that the Commission order is but interlocutory and not reviewable and that petitioner is not aggrieved and has not exhausted the administrative remedies; and pointing out that the eleven-cent rate was the actual amount paid on June 7, 1954, asserts that there is no error in the orders of the Power Commission.

We consider first the jurisdictional aspects of the review sought.

As was recognized in Phillips Petroleum Co. v. Federal Power Commission (10 Cir.) 227 F. 2d 470, cert. den. 350 U.S. 1005, Section 19 (b) of the Natural Gas Act does not by its terms limit the review of orders of the Commission to those which are final in form and substance. But it is entirely proper, in order to keep in proper perspective the duties and powers of administrative bodies with respect to their specialized fields, for courts to avoid conflicts by refusing to interfere in matters yet within the consideration of the Commission. Thus it has been held that an order of the Commission is not reviewable unless there has been an application to the Commission for rehearing; nor is an order granting a rehearing subject to review. Federal Power Commission v. Metropolitan Edison Co., et al., 304 U.S. 375, 58 S. Ct. 963, 82 L. Ed. 1408. It is there said:

> "The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive . . . The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

Such language must be read in relation to the facts of the case and, so limited, does not establish an inflexible standard requiring a conventional hearing and resulting in findings supported by evidence as a condition to review. Otherwise, the procedure for review could be successfully circumvented by a refusal to act upon a statutorily granted right. Pacific Power & Light Co., et al v. Federal Power Commission (9 Cir.) 98 F. 2d 835. An order of an administrative body is reviewable when action taken in advance of hearings or adjudication result in the setting of legal consequences, Columbia Broadcasting System v. United States, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563. The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, Isbrandtsen Co. v. United States (C.A. D.C.) 211 F. 2d 51, cert. den., 347 U.S. 90, and cases cited therein.

The present case is comparable to that considered by us in Phillips, supra, wherein we stated:

> "The orders sought to be reviewed here do not deal with the merits of the proceedings before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. The matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips

was authorized to charge Michigan on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing."

Also similar in impact to the case at bar is the order accepting a new schedule filed by a natural gas company in United Gas Pipe Line Co. v. Mobile Gas Service Corp., et al., 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

We consider, as did the Third Circuit in a similar case, Natural Gas Pipeline Company of America v. Federal Power Commission, filed February 26, 1957, (not yet reported), the contention of the Commission and Magnolia that petitioner is not aggrieved with Section 19 (b) of the Natural Gas Act most unrealistic. Petitioner has been compelled to pay eleven cents for its gas, and wrongfully so, because the Commission's acceptance of the rate schedule was pro forma the acceptance of the rate then being paid. To assert that petitioner's aggrievement lay with the invalid Kansas Corporation Commission order and not with the Power Commission's acceptance of Schedule 26 is but to play with words. Petitioner was twice aggrieved and has properly and consistently pursued separate remedies. And, since petitioner's complaint lies in the action of the Power Commission in accepting a rate schedule which was not the effective rate on the critical date, petitioner could not and need not pursue an administrative remedy under Section 5 of the Natural Gas Act to show that the accepted rate was unjust and unreasonable.

In view of the interpretation of the Natural Gas Act giving the Commission power to review rates set initially by contract, but providing no procedure by the contracting parties to either make or change rates, United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra, petitioner should not bear the burden of convincing the Commission that rates which it never assented to and which were imposed upon it by an invalid order are unreasonable.

Additionally, Section 19 (b) provides that the court of appeals "shall have exclusive jurisdiction to affirm, modify, or set aside" the orders of the Commission. The power of a district court to grant reparation of amounts paid pursuant to an invalid order accepted as a current rate by the Commission is presently being questioned by a petition for certiorari of the case of Harrington v. Federal Power Commission (5 Cir.) 246 F. 2d 915. Regardless of petitioner's right to pursue its remedies for the return of money paid prior to March 21, 1957, its rights to redeem excess payments made subsequent to the Commission's action are further imperiled in a separate action by the existence of the outstanding Commission order.

The question of whether or not petitioner has fully exhausted its administrative remedies is partially resolved by our determination that the order of the Commission was a final order and by petitioner's efforts to have the order changed by its protest and petition for rehearing. Petitioner was not obligated to undertake the burden of persuading the Commission to take action to invalidate the rate as unreasonable or detrimental to the public interest in accordance with Section 5.

That petitioner should have sought a declaratory order under Section 5 (d) of the Administrative Procedure Act, 5 U.S.C.A. 1004 (d) to terminate a controversy or remove an uncertainty is an argument obviously without merit. The position of the Commission was clearly announced and the petitioner's position was made known to the Commission -- there was no uncertainty which had not been resolved by the Commission's action on the petitions.

Finally, although the Commission admits the present invalidity of the Kansas order and offers to eventually expunge it from its records as void ab initio, the Intervenor insists that the legally effective rate for the period of time

during which payments were made in accordance with the order was the eleven-cent rate. Magnolia, in accordance with the definition of "rate schedule" contained in the Commission's regulations, 18 C.F.R. 154.93, filed its contract and twenty-seven other supplementary documents "effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates and charges . . . "

If the Kansas order were valid, there is no question but that despite the protests of the parties the contract would be altered by the order. Petitioner accepted this proposition by paying the ordered rate although it sought to have the order declared invalid. Having succeeded it is no worse position than the consumer in United Gas Pipe Line Co. v. Mobile Gas Corp., supra, which was aggrieved by the filing of a unilaterally increased rate initiated by its producer. The Act recognizes the rights of the parties to set rates by individual contract and abrogates none of the usual contract rights except for the reviewing powers granted the Commission upon hearing. As was said in the Mobile case:

> "Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate . . . On the other hand,

> denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other."

In the present case, as in the Mobile case, no hearing has been held to determine the propriety of the filed rate. When the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954. See Natural Gas Pipeline Company of America v. Federal Power Commission, supra.

Intervenor, however, asserts that by their contract Magnolia and Cities Service agreed to abide by orders of any regulatory body until such time as the same was held with finality to be invalid.

> All of the provisions of the contract are subject to all legislation, State or Federal, with respect to the subject matter hereof, and to all present and future gas proration and other applicable orders, rules and regulations of duly constituted authorities having jurisdiction unless the same shall be declared or held, with finality, to be invalid or ineffective with respect thereto. . . ."

To so interpret the contract would require a strained and unnatural construction of the parties' intent and a substitution of the word "until" for "unless."

The Commission, in a supplemental memorandum, states by way of clarification of its brief in chief that it is not admitting that the contract rate is six cents per Mcf. This is

a matter neither proper for our determination nor raised in the issues before us. Our duty is to merely set aside the order of the Commission accepting the filed rate and to direct the Commission to strike Supplement No. 26 from its files. Our authority is then exhausted. Cf. Sunray Mid-Continent Oil Co. v. F.P.C., 353 U.S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794.

It is so ordered.